IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CANDIDA STOKES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Civil Action No.**
THE CITY OF MONTGOMERY,	)	**2:07-cv-686**
ARTHUR BAYLOR, Chief of Police,	)	
BOBBY BRIGHT, Mayor, in	)	
their individual	)	
and official capacities,	)	
	)	
Defendant.	)	

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW Plaintiff, by and through counsel, pursuant to Rule 56 of the Federal Rules of Civil Procedure and respectfully moves this Court to enter summary judgment in favor of the plaintiff on her claim of interference under the Family Medical Leave Act ("FMLA"), 29 U.S.C.§ 2611, *et. seq*. Plaintiff states that there is no genuine issue as to any material fact and that she is entitled to a judgment as a matter of law on her claim of interference under the FMLA. In support of this Motion, plaintiff relies on her Memorandum in Support of Motion for Partial Summary Judgment and Evidentiary Submissions, both filed contemporaneously.

Respectfully,

/s/ Deborah A. Mattison
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CERTIFICATE OF SERVICE

I do hereby certify that on August 12, 2008, I filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Michael D. Boyle

s:/ Deborah A. Mattison
Of Counsel

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PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

This is an action alleging disability discrimination in violation of Titles I and II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111 *et seq.*, § 504 of the Rehabilitation Act, 29 U.S.C. § 794, and sexual discrimination in violation of Title VII of the Act of Congress known as the "Civil Rights Act of 1964," 42 U.S.C. Section 2000e *et seq.,* as amended, and the Civil Rights Act of 1991, 42 U.S.C. § 1981, §1981a. Plaintiff also alleges violations of the Family Medical Leave Act ("FMLA"), 29 U.S.C.§

2611, *et. seq*. and 42 U.S.C. 1983. Finally, plaintiff alleges retaliation under the aforementioned statutes. In this motion, plaintiff will only be addressing her claim for interference pursuant to the FMLA.

Plaintiff is entitled to Partial Summary Judgment concerning her interference claim under the FMLA. The material facts in this case are both undisputed and very simple. Stokes was a police officer for the City of Montgomery. She undisputedly performed her job well.

On December 19 2005, saddened by her mother's death and physically exhausted, Stokes attempted to commit suicide. It is undisputed that Stokes was person with a serious health condition, as that term is defined by the FMLA. It is also undisputed that, Stokes took approved FMLA leave, which expired on January 12, 2006.

At the end of her leave, Stokes attempted to return to her position as a police officer. However, Defendants refused to allow Stokes to return to either her position or an equivalent position. Instead, Defendants placed Stokes first on administrative leave, and then on administrative duty. In violation of the FMLA, Defendants also required her to secure a fitness for duty evaluation. Stokes complied and was found fit for duty, without restrictions. Defendants still failed to allow Stokes to return her to her position. Instead, Defendants terminated Stokes.

The relevant law under the FMLA is also clear. In an interference claim an employee is entitled to return to her previous (or an equivalent) position and an employer cannot second-guess the employee's physician's determination that an employee is capable of working. Further, Defendants have the burden of proof in an interference claim and strict liability applies. Since no genuine issue of material fact exists in this case, Stokes is entitled to summary judgment as to her FMLA interference claim.

II. STATEMENT OF UNDISPUTED FACTS

Candida Stokes was hired by the Montgomery Police Department in February 2002 as a police officer. It is undisputed that she was an excellent officer and that she performed her job very well. Pl. Exh. 2, deposition of Kevin J. Murphy p. 159:8- 10.[1] While employed by the City, Stokes received at least one promotion including a promotion to the rank of corporal, as well as several merit raises. Pl. Exh. 1 Declaration of Plaintiff.

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[1]Consistent with this Court's Order, "Murphy deposition, p. 159:8" refers to page 159, line 8 of Murphy's deposition.

As a police officer in the Montgomery Police Department, Stokes performed the following duties: patrolling her own route and making appropriate arrests and stops on that route. As a Corporal, Stokes the duties of a police officer as well as performed the following supervisory duties: performing roll call, inspecting officers and patrol vehicles at roll call, assigning patrol routes for officers on her shift, assisting in creating work schedules for shift officers, training other officers, and responding to certain types of calls which required a supervisor to be present and then completing the appropriate paperwork for those calls. As Corporal, Stokes was eligible for transfer and promotion to different divisions within the Department. Pl. Exh. 1

For all relevant time periods Author Baylor has been the Chief of Police. Baylor has the authority to approve or disapprove discipline. Murphy depo. p. 42:3-12. Lieutenant Colonel Kevin Murphy was the division commander of the patrol division and, accordingly also exercised authority over Stokes. Murphy depo. pp. 27:15 - 28:2.

For all relevant time periods, Bobby Bright has been the Mayor the Montgomery. As such he exercises the authority to discipline and terminate

City employees, including Stokes. Murphy depo. pp. 45:8 - 46:7. Pl. Exh. 15 deposition of Mayor Bobby Bright pp. 13:10-14; 20:2-6.

A. Stokes Takes Approved FMLA Leave.

On December 19, 2005, saddened by her mother's recent death and a divorce, Stokes attempted to take her life (while off duty) by ingesting several Tylenol. It is undisputed that at the time of her action, Stokes was both under extreme stress and chronically sleep deprived. Pl. Exh. 1. Stokes was immediately hospitalized for her depression for approximately two weeks. Thereafter, she received outpatient mental health treatment for her condition. Pl. Exh. 1.

Defendants were aware of Stokes suicide attempt by the time she had been admitted into the hospital. Pl. Exh. 4, deposition of John Carnell, Risk Manager for the City, pp. 15:1- 16:3; 16:23 -17:5. As a result of her condition, it is undisputed that Stokes was a person a serious health condition. With full knowledge of Stokes suicide attempt, defendants granted Stokes FMLA due to her serious health condition. Pl. Exh. 3, deposition of Arthur Baylor p. 99:12-20; Murphy depo. p. 99:9-19. The leave began on December 19, 2005, and it expired on January 12, 2006. Pl.

Exh. 5. Bright and Baylor approved the leave. Pl. Exh. 6; Bright depo. p. 83:13-17.

B. Stokes Is Released to Work Without Restrictions; but Defendants Will Not Allow Her to Return.

Stokes completed her outpatient program and received a certificate of completion. Around the scheduled end of her FMLA leave, Stokes reported to work with the certificate of completion, having been released to work without restrictions by Harwood, her treating physician. Pl. Exh. 1. However, Defendants refused to allow Stokes to return to work. No one from the City told Stokes that they needed to secure further information from her treating physician nor did anyone ask Stokes' permission to call such professionals. Pl. Exh. 1. Instead, on January 13, Defendants placed Stokes on administrative leave, pending Stokes' undergoing a psychological evaluation by a physician selected by Defendants. Pl. Exh. 1; Pl. Exh. 7. Defendants decided to require Stokes to undergo this evaluation while Stokes was on FMLA leave. Carnell depo. p. 17:6-17. Stokes was referred to Dr. Schaffer for the evaluation. Stokes met with Dr. Schaffer on or about January 20, 2006.

Defendants' requirement that Stokes undergo a fitness for duty evaluation is inconsistent with the manner in which Defendants treat other city employees returning from FMLA. Indeed, Carnell, who over sees fitness for duty evaluations, acknowledged that it was uncommon to require police officers returning from FMLA leave to secure a fitness for duty prior to returning to work. Carnell depo. pp. 7:6-9; 26:5 - 28:18; 31:12 - 32:1. Baylor could not identify any other employee who had not been returned to his or her previous position. Baylor depo. p. 101:5- 23.

C. Stokes Is Found Fit For Duty; But Defendants Still Will Not Allow Her To Work As A Police Officer.

On January 20, 2006, Dr. David Schaffer, D.O., Ph. D, a psychiatrist and Medical Director of Park Place Psychiatry performed the fitness for duty evaluation. Dr. Schaffer also released Stokes to return to her position as a police officer without restrictions. Dr. Schaffer wrote that, at the request of Risk Management for the City of Montgomery, he conducted a fitness for duty evaluation of Stokes and that Stokes was capable of returning to her job, stating "Once again, it is my professional opinion that she is fit to all duties as a police officer." Pl. Exh. 9. Dr. Schaffer also found that an important consideration in the cause of Stokes' suicide attempt was her extreme stress and the fact that she had been chronically deprived of sleep. Pl. Exh. 9. Defendants still did not allow Stokes to return to her position as a police officer. Instead, on January 24, 2006, Defendants placed Stokes on administrative duties (sic) until further notice and refused to allow her to wear her police uniform or be armed. Pl. Ex. 1. While on administrative duties, Stokes was limited to work in the police department headquarters and was not allowed to work on the street. Pl. Exh. 10; Murphy depo. pp. 48:17- 49:9; 118:19- 119:20; 133:4 - 134:4; 135:3 -136:3. While performing Administrative Duties, Stokes duties were limited to taking telephone calls and stamping reports. Pl. Ex. 1. There is no evidence that Defendants ever attempted to contact Stokes treating physician to attempt to secure any further information or to address any questions they may have had about Stokes ability to return to work. Pl. Exh. 1; Murphy depo. pp. 63:23 - 64:4; Bright depo. pp. 104:15-108:2.

On February 25, 2004, Stokes requested to be transferred to another division and she was on a list of persons eligible for a transfer. On February 2, 2006, Stokes request for a transfer was denied. Pl. Exh. 1. The basis for Defendants' refusal to allow the transfer was that:

> Corporal Stokes is currently being evaluated by a physician and licensed counselor in order to determine her fitness for duty as a Montgomery Police Officer. Due to these circumstances, Corporal Stokes is ineligible for a transfer to another division at the present moment.

Pl. Exh. 11.

However, the City has no actual rule that prohibits employees who are undergoing a fitness for duty evaluation from transferring to another position. Murphy depo. pp. 131:7 -132:6. On February 22, 2006, Stokes again requested to be transferred to the Detective Division. Pl. Exh. 12.

On February 27, 2006, Dr. Harwood wrote a letter to Defendants stating that Stokes was capable of returning to work as a police officer. He urged Defendants to contact him if they had any questions. Pl. Exh. 13. On February 28, 2006, Linda Holmberg wrote another letter stating that Stokes was fit to return to duty. Pl. Exh. 8.

D. Defendants Terminate Stokes.

On May, 2006, Defendants terminated Stokes. Pl. Exh. 14. The undisputed reason that Defendants terminated Stokes was the same reason that entitled Stokes to FMLA leave– because she attempted suicide. The decision-makers included Defendants Baylor and Bright, who was the final decision maker. Pl. Exh. 14; Bright depo, p.20:2-6. Baylor admitted that the basis for his recommendation was that Stokes had attempted suicide. Baylor depo. pp. 33:7 - 34:11; 107:8 -14; Carnell depo. p. 21:1-3. Mayor Bright also testified that Stokes' attempted suicide as the reason for her termination. Bright depo. pp. 22:14-19; 71:15-18. Regardless of the fact that Stokes was repeatedly cleared to return to work, Defendants speculated that Stokes might again attempt suicide and that she was a liability. Baylor depo. pp. 80:2- 82:19; Bright depo. pp.22:22-24:19. There was no way that Defendants would have returned Stokes to return to her position.

> Q: What, if anything, could Ms. Stokes have done to put you at ease that she wasn't going to be a risk or a liability? It sounds like probably nothing.
>
> MR. BOYLE: Object to the form.
>
> A. I can't think of anything.

Murphy depo. p. 64:9-15. Due to her suicide attempt Murphy "would not feel comfortable" with Stokes working for the City. Murphy depo. p. 65:8-9.

It is also undisputed that Defendants had no evidence that Stokes was not fully qualified to return to her position as a police officer. Carnell testified:

> Q. Did you have any evidence that she was not fit for duty?

A. At the time, no. I have to go basically on what they tell me.

Q. At any point, have you had any evidence that Deputy Stokes we notified to return to her job?

A. No.

Carnell depo. p. 18:10-17. And,

Q. Did you have any evidence at all that she might attempt it again?

A. No, I didn't.

Carnell depo. p. 21:4-6. Baylor admitted that he had no evidence that would contradict any of the medical assessments of Stokes' ability to work, including the City's fitness for duty evaluation, which stated that Stokes was capable of returning to work as a police officer without restrictions. Baylor depo. pp. 82:20 - 83:18; 117:11-16; 187:18 - 190:12. Mayor Bright also admitted that he had no medical evidence that would support the decision to terminate Stokes. Bright depo. pp. 32:23 - 33:14; 79:18- 80:13. Carnell admitted that Stokes termination was unfair and that there was a risk that any officer might attempt suicide. Carnell depo. p. 24:13-20; 42:16-19.

Contrary to their treatment of stokes, Defendants do not monitor the physical or mental health of other police officers and they do not attempt to assure that other police remain fit for duty. Bright depo. p. 39:1-3.

Defendants admit that any police officer could attempt suicide. Baylor depo. pp. 111:22 - 112:15; 116:9 - 117:10; Carnell depo. pp. 25:14 -26:4; Murphy depo. p. 150:8-12; Bright depo. p. 9:6-12. Additionally, police officers who are addicted to alcohol and/or illegal drugs are not necessarily terminated. Rather, such officers may be suspended for 45 days or be allowed to enter treatment. Baylor depo. pp. 119:4-20; 205:18 - 210:3; Carnell depo. pp. 13:1-11; 44:13 - 45:15. Carnell testified that he has no current concern about Stokes' ability to return to work. Carnell depo. p. 76:10-15.

III. DEFENDANTS UNDISPUTEDLY VIOLATED STOKES' RIGHTS UNDER THE FMLA BY INTERFERING WITH HER RIGHT TO RETURN TO WORK.

Stokes was eligible for and took leave pursuant to her rights under the FMLA. When Stokes presented her certificate of completion of her treatment, Defendants were under a duty to restore her to her former

position

or an equivalent position. Defendants did not do this. Instead, Defendants impermissibly required Stokes to submit to a fitness for duty examination because of her need for FMLA leave and/or due to Stokes underlying serious health condition. Defendants impermissibly ignored the opinion of both Stokes' treating physician and Defendants doctor who also cleared Stokes to work with no restrictions. Since Defendants never returned Stokes to her former position or an equivalent position, Defendants interfered with Stokes' FMLA rights as a matter of law and Summary Judgment should be granted to Plaintiff on this claim.

A. The Standard For Granting Summary Judgment.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Federal Rules of Civil Procedure Rule 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986). "There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor." *Waddell v. Valley Forge Dental Assocs., Inc.*, 276 F.3d 1275, 1279 (11th Cir.2001). The evidence, and all inferences drawn from the facts, must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The non-moving party must make a sufficient showing on each essential element of the case for which he has the burden of proof. *Celotex Corp*., 477 U.S. at 323.

B. The FMLA Entitles An Employee To Return to Work Upon The Expiration of FMLA Leave.

Congress enacted the FMLA "to balance the demands of the workplace with the needs of families" and "promote the stability and economic security of families" by creating an entitlement for "employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." 29 U.S.C. 2601(b).

The FMLA provides an eligible employee with the right to take up to twelve weeks of leave annually because of the employee's own serious health condition. 2601(a)(1)(D). A "serious health condition" is defined as "an illness, injury, impairment, or physical or mental condition that involves ... inpatient care ... or continuing treatment by a health care provider." 29 U.S.C. § 2611(11). An employer may require employees seeking leave for medical reasons to provide certification of their serious health conditions from their health care providers. 29 U.S.C. § 2613(a). Such certification "shall be sufficient" if it includes the date on which the condition commenced, its probable duration, "appropriate medical facts ... regarding the condition," and "a statement that the employee is unable to perform the functions of [her] position." 29 U.S.C. § 2613(b). An employer may demand a second opinion if it "has reason to doubt the validity" of the provider's certification. 29 U.S.C. § 2613(c).

One of the FMLA's hallmarks is that it entitles an employee who takes leave, the right to return to his or her position, or its equivalent, upon the expiration of the leave. Specifically, upon return from FMLA leave, 29 U.S.C. § 2614(a) requires that:

> (1) * * * [A]ny eligible employee who takes leave under [19 U.S.C. § 1612] for the intended purpose of the leave shall be entitled, on return from such leave-
>
> (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or
>
> (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

29 U.S.C. § 2614(a).

Further, the FMLA expressly restricts the type of information an employer may require of an employee who is returning to work.

> (4) * * * As a condition of restoration under paragraph (1) for an employee who has taken leave under [29 U.S.C. § 2612(a)(1)(D)], the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

See also *Langlois v. City of Deerfield Beach, Florida*, 370 F.Supp. 2d 1233, 1241-1242 (S.D. Fla. 2005); *Brumbalough v. Camelot Care*, 427 F.3d 996, 1003-1004 (6th Cir. 2005); *Albert v. Runyon,* 6 F.Supp. 2d 57, 62-62 (D. Mass. 1998); 29 C.F.R. § 825.310(a).

The FMLA recognizes that an employer may have questions concerning the scope of a doctor's release. Thus, the Act authorizes contact between the employer and the employee's health care provider. However, the conditions and limitations placed on this contact make clear the primacy of an employee's right to immediate reinstatement. The FMLA does not authorize the employer to contact the healthcare provider without the permission of the employee. The Act does not authorize the scope of the contact to go beyond the limited purpose of clarification of the certification. The Act does not authorize the contact to occur more than once. Indeed, the Secretary of Labor explicitly rejected an interpretation of the FMLA statute that would have allowed an employer to selectively seek a second or third medical opinion on fitness for duty certifications after submission of the initial certification as in the case of the original medical certification for FMLA leave. See 60 Fed. Reg. 2180, 2226 (Jan. 6, 1995)(Summary of Major Comments).

In addition, an employer cannot selectively require an employee to undergo a fitness for duty evaluation. While the employer is free to contact the employee's treating physician to seek any clarification regarding the employee's ability to return to work, it can only require a fitness for duty evaluation if it is the employer's practice of informing requiring such for all similarly situated employees returning from FMLA leave. 29 C.F.R. § 825.310. See also *Langlois v. City of Deerfield Beach, Florida*, 370 F.Supp. 2d 1233, 1241-1242 (S.D. Fla. 2005); *Brumbalough v. Camelot Care*, 427 F.3d 996, 1003-1004 (6th Cir. 2005); *Carpo v. Warburg*, 2006 WL 2946315, *3-*5 (E.D.N.Y. 2006); *Underhill v. Willamina Lumber Co.*, 1999 WL 421596, *5-*9 (D.Or. 1999).

Finally, and perhaps most importantly, the FMLA "does not authorize an employer to make its own determination of whether an employee is fit to return from FMLA leave following recovery from a serious health condition. Rather, an employer must rely on the evaluation done by the employee's own clinician and return the employee to work without delay upon receipt of medical certification." *Albert*, 6 F.Supp.2d at 62.

The Eleventh Circuit has recognized that an employee may pursue two separate types of claims under the FMLA–a claim for interference and/or a claim for retaliation. 29 U.S.C. 2615(a) creates two different types of claims to "enforce the rights granted under the Act.:(i) interference claims, in which an employee claims that his employer interfered with his substantive rights under the FMLA, and (ii) retaliation claims, in which an employee claims that his employer discriminated against him for engaging in an activity protected by the FMLA." *Connor v. Sun Trust Bank*, 546 F.Supp. 2d 1360, 1369 (N.D. Ga. 2008), *citing Strickland v. Water Works and Sewer Bd.*, 239 F.3d 1199, 1206 (11th Cir. 2001). The relevant part of the Act, 29 U.S.C. § 2615, reads as follows:

> (a) Interference with rights
>
> > (1) Exercise of rights
> > It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.
> >
> > (2) Discrimination

> It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

Defendants have the burden of proof in an interference claim and a strict liability standard applies. In such a claim, an employee must only present evidence that her employer interfered with a substantive right guaranteed by the FMLA. "a plaintiff need only demonstrate that [she] was entitled to but denied the right. [S]he does not have to allege that [her] employer intended to deny the right; the employer's motives are irrelevant." *Strickland* at 1208. *See also O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1353-54 (11th Cir.2000); *King v. Preferred Technical Group*, 166 F.3d 887, 891 (7th Cir.1999). An employer may avoid liability only if it can demonstrate that it refused to provide the specific right "for a reason wholly unrelated to the FMLA leave." *Strickland* at 1208.

C. Defendants are liable for interfering with Stokes' right to return to her position.

Summary judgment should be granted as to Stokes' interference claim. When viewing the evidence in the light most favorable to Defendants, the inescapable conclusion is Stokes was an "eligible employee," who had a qualifying "serious health condition." It is undisputed that Stokes' leave was approved FMLA leave. It is undisputed that Stokes attempted - but was not allowed - to return to work in her previous position and thereafter she was fired. Stokes' presentation of the certificate when she attempted to return to work triggered her right to be restored to her former position of employment or an equivalent position. The City denied this right and impermissibly required Stokes to undergo a fitness for duty evaluation. Even though Stokes passed that evaluation without any restrictions, Defendants– all of whom admittedly had no evidence to the contrary–concluded that Stokes was not capable of performing her duties as a police officer and refused to return her to either a police officer or an equivalent position. Accordingly, as a matter of law, Defendants are liable for interfering with Stokes' rights under the FMLA.

First, it is undisputed that Stokes was entitled to FMLA. As a result of her suicide attempt, Stokes required overnight hospitalization and continued outpatient treatment. Defendants approved Stokes' FMLA leave, to begin on December 19, 2005 and expire on January 12, 2006. Defendants appear to concede this point.

Second, Stokes was entitled to return to her position as a police officer on January 13, 2006. Before the scheduled end of her FMLA leave, Stokes provided Defendants with a certification that she had completed her outpatient treatment. Upon receipt of this certification, the City had a duty to reinstate Ms. Stokes to her former position. The City failed to do this. Undisputedly, Defendants never asked Stokes to secure clarification from her treating physicians. And, several courts have deemed certifications similar to Plaintiff's legally sufficient even though they contained very little information. *See Brumbalough v. Camelot Care Centers*, 427 F.3d 996 (6th Cir. 2005)(finding handwritten note from doctor stating "she may return to work on 8/13/01. She should only work a 40-45 our week and limit her out-of-town travel to 1 day per week" sufficient to trigger employer's duty to reinstate); *Carpo v. Wartburg Lutheran Home for the Aging*, 2006 WL 2946315 (E.D.N.Y. 2006) (finding handwritten note from doctor stating "pt may attempt return to work on 2/3/04" sufficient as a matter of law); *Albert v. Runyon,* 6 F.Supp.2d 57 (D.Mass. 1998) (deeming sufficient a note from treating psychologist certifying plaintiff fit to return to work, "provided that the Postal Service makes the necessary changes that assure her of freedom from gender-based harassment and discrimination, and reverses any previously taken discriminatory action."); *Underhill v. Willamina Lumber Co.*, 1999 WL 421596 (release signed by doctor stating "pt. May return back to work" sufficient to trigger right to reinstatement).

It is also undisputed that Defendants did not attempt to contact Stokes' treating physician for further clarification regarding Stokes ability to perform her position as a police officer. Rather than return Stokes to work as a police officer, Defendants placed her first on administrative leave, and then on administrative duties. The City also asked Stokes to submit to a fitness for duty certification performed by a doctor of the City's choosing. Significantly, Defendants made the decision to require Stokes to undergo a fitness for duty evaluation while Stokes was on FMLA leave. Carnell depo. pp. 35:4 - 36:1. It is undisputed that Defendants do not request fitness for duty assessments for all - or even most - police officers. This was a clear violation of the FMLA regulations and thus constitutes impermissible interference with Stokes' rights under the FMLA. The City's doctor also provided a fitness for duty certification for Stokes. However, the City ignored this second opinion just as it ignored the first opinion.

Although Stokes should have not been required to complete the fitness for duty assessment, it is undisputed that she complied with Defendants' instructions and the evaluation concluded that Stokes was able to return to her position without any restrictions. It is also undisputed that Dr. Harwood, Stokes' treating physician, and Defendants' EAP counselor, Ms. Holmberg, wrote Defendants and told them that Stokes had been cleared to return to work without restrictions. Dr. Harwood's letter unequivocally states that Stokes was "ready to return to duty as a police officer." If the City had any question as to the scope of Dr. Harwood's release, it should have contacted Dr. Harwood for clarification. It is undisputed that Defendants did not make this contact.

At no time during this process was Stokes returned to her former position or an equivalent position. Instead, Defendants - all of whom admittedly had no evidence to the contrary - unilaterally concluded that Stokes was not capable of performing her duties as a police officer and terminated her. Admittedly, none of the 'positions' which Ms. Stokes occupied subsequent to her FMLA leave were equivalent to her former position as a Corporal in the Patrol Division. In order to be equivalent, an employee's new position must be "virtually identical to the employee's former position in terms of pay, benefits and working conditions, which must entail substantially equivalent skill, effort, responsibility, and authority." 29 C.F.R. 825.215(a). The new job must have similar opportunities for advancement in terms of promotion and salary increase. *Darby v. Bratch*, 287 F.3d 673, 679 (8^{th} Cir. 2003). Also important is whether other employees generally view the new and old positions as equally desirable. *Hunt v. Rapides Healthcare Sys., LLC*, 277 F.3d 757, 766 (5^{th} Cir. 2001).

The positions offered to Stokes after submission of her return to work certification were drastically different than the position she had before taking FMLA leave. As a corporal, Stokes had her own patrol route. She wore a uniform, carried a service weapon and assisted in calls throughout Montgomery. From the Patrol division it is possible to be promoted to the Detective division. While on administrative leave without pay, Stokes was clearly not in an 'equivalent position.' Stokes was not receiving the same pay. While on administrative leave (both with and without pay) and after she was terminated, Stokes was not allowed to work at all. When the City placed Stokes on administrative duty, Stokes was not allowed to wear her uniform. She was not allowed to carry her badge. The City forbade Stokes from carrying her service weapon. On administrative duty Stokes was required to sit at the back desk and process paperwork all day. Her duties were substantially different. The position on the back desk was not viewed with the same respect or as desirable as a police officer. It was viewed as a punishment for officers who were in trouble with the Department.

Furthermore, while on administrative duty, Stokes was unable to perform any of the supervisory responsibilities she had earned as a Corporal. Stokes' supervisory duties included performing roll call, inspecting officers and patrol vehicles at roll call, assigning patrol routes for officers on her shift, assisting in creating work schedules for shift officers, training other officers, and responding to certain types of calls requiring supervisors to be present such as felonies and officer-related incidents. The taking away of supervisory responsibilities was very demeaning to Stokes. *Donahoo v. Master Data Center*, 282 F.Supp. 2d 540 (E.D. Mich. 2003) (even though position of receipt analyst had the same pay and benefits as plaintiff's former position as conversion programmer, the positions were not equivalent in terms of status and therefore were not equivalent as a matter of law under the FMLA).

Defendants cannot demonstrate that their actions in denying Stokes her right to restoration were "wholly unrelated" to her FMLA leave. Defendants admit that the reason that Stokes was terminated was because she attempted to commit suicide. Defendants - who have no medical background — expressly rejected Stokes' physician's release of her to work without restrictions. They also admit that they have no evidence that she was a risk or may again attempt such. Since it was Stokes' suicide attempt which undisputedly gave rise to her FMLA leave, Defendants cannot escape the conclusion that their refusal to allow Stokes to return to work was related to her leave. Therefore, summary judgment should be granted on Ms. Stokes' interference claim.

Other courts have granted summary judgment for plaintiff's in similar circumstances. See, for example, *Langlois v. City of Deerfield Beach, Florida,* 370 F.Supp.2d 1233 (S.D. Fla. 2005)(granting plaintiff's motion for summary judgment on plaintiff's claim that Defendant interfered with his FMLA rights by failing to reinstate him upon presentation of certificate from his health care provider verifying that he was fit for duty); *Underhill v. Willamina Lumber Co.*, 1999 WL 421596 (D. Or. 1999)(granting plaintiff's motion for partial summary judgment on the issue of liability for defendant's interference with plaintiff's right under FMLA to return to work).

In *Carpo v. Wartburg Lutheran Home for the Aging*, 2006 WL 2946315 (E.D.N.Y. 2006), the Court granted plaintiff's motion for summary judgment on her FMLA interference claim. First, in considering the appropriateness of the motion, the Court stated, Summary judgment is appropriate only if a party's papers "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."Fed.R.Civ.P. 56(c). As is plain from the rule, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact."*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Here, the FMLA determines the material facts. See id. at 248 ("[T]he substantive law will identify which facts are material."). The FMLA makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the Act]."29 U.S.C. § 2615(a)(1). Accordingly, an employer may not interfere with the right of an "eligible employee" to 12 work-weeks of leave during any 12-month period "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee."29 U.S.C. § 2612(a)(1)(D). Nor may the employer interfere with the right of the employee to be restored to her old job or an equivalent position. See29 U.S.C. § 2614(a)(1). An employer may as a policy or practice, however, require "[a]s a condition of restoration" that the employee "receive certification from the health care provider of the employee that the employee is able to resume work...."29 U.S.C. § 2614(a)(4).

The parties do not disagree about the material factual context of Carpo's termination. It is undisputed that Carpo was an "eligible employee," that she qualified for FMLA leave on account of her injury, that her leave was designated FMLA leave, and that she returned to her job at the appropriate time. It is also undisputed that Wartburg had a policy of requiring a doctor's certification that employees returning from FMLA leave were able to resume "full duties." Rather, the parties disagree on the purely legal questions of whether the handwritten note from Carpo's doctor was an adequate certification for FMLA purposes and, if it was not, whether Wartburg was therefore entitled to terminate Carpo immediately. There is thus no genuine issue of material fact and the questions are suitable for summary judgment.

Id. at *2.

The Court went on to analyze the plaintiff's motion for summary judgment as follows:

> (The policies behind the FMLA support this plaintiff's motion. "To the extent pertinent to the present action, the FMLA was enacted because of Congress's view that 'there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods....' ") *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 160 (2d Cir.1999). . . .

Carpo at *4.

In light of these clear legal principles, one must conclude that Defendants violated Stokes rights under the FMLA by interfering with her rights under that statute. Thus, Stokes is entitled to summary judgment on that claim.

IV. CONCLUSION

WHEREFORE, premises considered, plaintiff requests that this Court enter an Order granting summary judgment as to plaintiff's FMLA interference claim.

Respectfully submitted,

/s/Deborah A. Mattison
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 12th day of August 2008, I filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Michael D. Boyle

/s/ Deborah A. Mattison